THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) No. 901/2004

* Judgment delivered on: 04.07.2006

+ SHRI KULDIP GANDOTRA ...Plaintiff

- versus -

SHRI SHAILENDRA NATH ENDLAY & ANOTHER ...Defendants

Advocates who appeared in this case:

For the Plaintiff : Mr O.N. Vohra, Sr Advocate with Ms Shradha Bhargava
For the Defendants : Mr Sarvesh Bisaria

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J

1. This is a suit for specific performance of an agreement to sell dated 31.03.2004 and for possession in respect of Flat No.C-9/9551, Vasant Kunj, New Delhi-110070 (hereinafter referred to as 'the said flat').

2. In the plaint, the plaintiff has averred that on 31.03.2004, an agreement to sell in respect of the said flat was entered into by the plaintiff as the intending

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purchaser and the defendant No.1 as the intending seller. The said agreement was entered on behalf of the defendant No.1 by the defendant No.2 who held a general power of attorney in her favour. It is further stated in the plaint that the defendant No.1 had acquired the said flat on allotment from the Delhi Development Authority (DDA) and the same was a leasehold property. It is averred that the same was eligible for conversion into freehold on payment of the prescribed charges as per the policy of the DDA. It is further stated that the said flat was in occupation of a tenant who had been inducted by the defendant No.1 and that the sale would be completed after the property is vacated by the tenant and that at the time of registration, vacant possession of the said flat would be handed over to the plaintiff by the defendants. As per the plaint, the salient and important terms of the agreement to sell dated 31.03.2004 were that the sale consideration was fixed at Rs.32,50,000/- out of which a sum of Rs.1,00,000/- had been paid to the defendant No.1 through the defendant No.2 at the time of entering into the said agreement. The balance sale price of Rs.31,50,000/- was payable at the time of registration of the sale deed. Vacant possession of the said flat was to be delivered by the defendants 1 and 2 to the plaintiff at the time of registration of the sale deed. The date of vacation of the flat by the tenant was indicated as 30.06.2004. The flat was to be got vacated by the defendants. The defendants, according to the

plaintiff, also undertook the obligation of getting the said flat converted into freehold as per the prevalent policy. However, the necessary fees / charges for such conversion were to be borne by the plaintiff. It is further averred that the plaintiff deposited a sum of Rs.80,000/- or so on account of conversion fee and the charges in May, 2004 at the behest and instance of the defendants. It is further averred that the plaintiff declared that he was prepared to do all other acts, if any, that were necessary in connection with the conversion of the status of the property from leasehold to freehold. According to the plaintiff, this was the most significant obligation undertaken by the defendants as it, *inter alia*, implied that the defendants had clear and absolute title to pass to the plaintiff.

3. The plaint further discloses that the defendants did take some steps towards the discharge of the obligation towards conversion of the said flat into free hold and kept the plaintiff informed with the assurance that the needful would be done expeditiously. The plaintiff averred that a legal notice dated 13.07.2004 was sent to the plaintiff on behalf of the defendants stating that the defendants had got the flat vacated from the tenant on 15.05.2004 and that the plaintiff was informed of this telephonically as well as personally by the defendant No.2. It was further stated in the legal notice dated 13.07.2004 that the plaintiff was required to make

the payment of the balance sale consideration of Rs.31.5 lakhs on or before 15.07.2004 and in case the plaintiff failed to do so, the amount of Rs.1 lakhs deposited in advance would be forfeited by the defendant No.2. It was further averred that in the said letter dated 13.07.2004, the defendants had indicated that in terms of the agreement, it was the liability and responsibility of the plaintiff to get the flat converted into free hold and that the plaintiff was also liable to pay all the expenses for that. The plaintiff has averred in the context of these allegations contained in the letter dated 13.07.2004 that the same are untrue. The plaintiff has averred that he was not notified of the vacation of the said flat. The plaintiff has also stated that the payment of the balance amount of Rs.31.5 lakhs was to be made on or before 15.07.2004, but, subject to the defendants getting the said flat converted to freehold and, for this, the responsibility lay on the defendants. The plaint further refers to the notice dated 27.07.2004 sent on behalf of the defendants and received by the plaintiff. As per this notice, the defendants have alleged that time was of the essence of the contract and the plaintiff was required to make the payment of the balance sale consideration by 15.07.2004. The notice also provided that the plaintiff having failed to make the said payment, the amount of Rs.1 lakh stood forfeited by the defendants and the agreement to sell dated 31.03.2004 stood cancelled.

4. It is the plaintiff's case that the obligation for getting the flat converted to freehold was upon the defendants. They did not cooperate in getting the same done by 15.07.2004. Yet, they insisted that the plaintiff part with the balance consideration of Rs.31.5 lakhs even though the conversion of the flat from leasehold to freehold had not been completed. It is the plaintiff's contention that perhaps the defendants have resiled from their obligation on account of their desire to get a higher price as a result of the upward trend in the market prices of properties. The plaintiff has specifically averred that the plaintiff has been from the day one and is ready as well as willing to perform his part of the contract. In these circumstances, the plaintiff has instituted the present suit seeking specific performance of the said agreement to sell dated 31.03.2004 and subsequent delivery of vacant possession by the defendants to the plaintiff. The plaintiff has also made an alternative prayer of return of the amount received and the amount paid to the DDA towards conversion fee / charges as well as damages with interest @ 12% per annum.

5. The defendants 1 and 2 filed a joint written statement. In the written statement, the defendants, *inter alia*, took the preliminary objection that the

plaintiff has not paid the proper court fee on the plaint. The execution of agreement to sell dated 31.03.2004 was not denied. However, it was contended that at the time of execution of the said agreement, the defendant No.2, acting as an attorney holder of the defendant No.1, had informed the plaintiff that the defendant No.2 is an old lady of 70 years and that the plaintiff assured the defendants that it would be the responsibility and liability of the plaintiff to get the said flat converted from leasehold to freehold. It is further stated in the written statement that the defendant No.2 showed all the documents in her possession to the plaintiff and also informed the plaintiff that the plaintiff has to make the full and final payment by 15.07.2004 to the defendants, otherwise, the advance given to the defendants would stand forfeited. It is further averred in the written statement that the defendants got the said flat vacated from the tenant on 15.05.2004 and the plaintiff was informed telephonically as well as personally by the defendant No.2 that the flat had been vacated by the tenant on 15.05.2004 and that the plaintiff was required to make the payment of balance sale consideration and take over the possession of the flat. It is averred that the plaintiff never acknowledged the receipt of the defendants and ultimately as time was of the essence of the contract, the advance paid by the plaintiff was forfeited and the defendants gave the reply of the notice on 27.07.2004 informing the plaintiff that

the agreement stood cancelled. It was stated in the written statement that in terms of clause 12 of the agreement to sell dated 31.03.2004, time was of the essence of the contract inasmuch as it was provided therein that in the event of failure on the part of the vendee to meet the commitment of the agreement within 15 days of the vacation of the flat or 15.07.2004, whichever is later, the vendor will forfeit the advance of Rs.1,00,000/-. The defendants averred that as the plaintiff failed to complete his part of the contract and time was of the essence of the contract, the agreement automatically stood cancelled in terms of the said clause 12 of the agreement to sell dated 31.03.2004. In the written statement, it was denied that the plaintiff had been ready and willing to perform his part of the contract. It was stated that the plaintiff had not placed any document or proof to show that the plaintiff had sufficient funds either on 15.07.2004 or at the time of filing of the present suit before this court. It was also denied that the plaintiff was entitled to any damages as claimed.

6. The plaintiff filed a replication reiterating the contents of the plaint. The plaintiff reiterated that the liability of conversion from lease hold to free hold was upon the defendants and not upon the plaintiff and that the defendants were misconstruing the agreement to sell dated 31.03.2004. It was stated in the

replication that the possession was to be given to the plaintiff on execution and registration of the sale deed after the defendants discharged their twin obligations, namely, getting the said flat vacated by the tenant and obtaining conversion from leasehold to freehold. Unless that was done, the question of the plaintiff making any payment did not arise. It was further stated in the replication that since April, 2004, the plaintiff kept a sum of Rs.33 lakhs in the form of fixed deposit receipts, encashable at any time.

7. On the basis of these pleadings, the following issues were framed by this court on 25.02.2005:-

> "1. Whether proper Court fee has not been paid ? OPD.
>
> 2. Whether the time was the essence of the contract and the plaintiff failed to perform his part under the agreement ? OPD.
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> 3. Whether the plaintiff is entitled to a decree for specific performance on the grounds pleaded in the plaint? OPD.
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> 4. Whether in the alternative, the plaintiff is entitled to refund of the amount alongwith damages and interest as prayed ? OPP
>
> 5. Relief."

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8. The following documents filed on behalf of the plaintiff were exhibited:-

i) Original agreement to sell dated 31.03.2004 (Exhibit-P-1).

ii) A copy of notice dated 13.07.2004 sent on behalf of the defendant No.2 to the plaintiff (Exhibit-P-2).

iii) A copy of notice dated 27.07.2004 sent on behalf of the defendants to the plaintiff (Exhibit-P-3).

iv) A copy of the Challan dated 24.05.2004 depositing a sum of Rs.11075 (Exhibit-P-4).

v) Acknowledgment receipt of DDA dated 11.06.2004 (Exhibit-P-5).

vi) Conveyance Deed (draft of) to be issued on conversion of lease hold into free hold. (Exhibit-P-6).

vii) Letter from DDA regarding stamping of Conveyance Deed dated 29.04.2004. (Exhibit-P-7).

viii) Copy of Special Power of Attorney dated 10.05.2004 (Exhibit-P-8).

ix) Copy of Challan No.8083 in respect of cash Rs.66060/- paid on 25.05.2004 (Exhibit-P-9).

x) Copy of Challan 80834 dated 25.05.2004 for a sum of Rs.20 (Exhibit-P-10).

9. The defendants, inter alia, filed the following documents:-

i) Copy of General Power of Attorney dated 25.08.1982 executed by the defendant No.1 in favour of, *inter alia*, defendant No.2 (Exhibit-D-1).

ii) Original Possession Slip issued by Mr Ravi Kapila dated 15.05.2004 (Exhibit-DW-1/5).

iii) Original Possession Slip Issued by Viney Lata Chandra dated 15.05.2004 (Exhibit-DW-1/6).

iv) Original letter dated 09.07.2004 sent by the plaintiff to the defendants (Exhibit-D-2).

v) Original notice dated 21.07.2004 issued by the plaintiff's advocate to the defendants' advocate (Exhibit-D-3).

The plaintiff has deposed as PW-1 in support of his case and the defendants have examined defendant No.2 as DW-1. Both the witnesses had given their evidence by way of affidavits in the first instance and were subsequently cross-examined.

10. **Issue No.1**

This issue with regard to the question of appropriate court fee was not pressed by the learned counsel for the defendant and as such the same is decided in favour of the plaintiff.

11. **Issue No.2**

This issue is composed of two parts. First, whether time was of the essence of the contract and, the second, whether the plaintiff failed to perform his

part under the agreement. The onus is on the defendants on both counts. Whether time was of the essence has to be construed in the light of the contract entered into between the parties. There is no dispute that the agreement to sell dated 31.03.2004 (Exhibit-P-1) was entered into by and between the parties. It was contended on behalf of the defendant that the agreement (Exhibit-P-1) stipulated that time would be of the essence. The learned counsel for the defendants referred to clause 12 of the agreement (Exhibit-P-1). The said clause reads as under:-

> "12. That in the event of failure on the part of the vendee to meet the commutment (sic) of this agreement within fifteen days of vacation of the flat or 15th July, 2004 whichever is later, the vendor will forfeit the advance of Rs.1,00,000/-.:

12. The learned counsel for the defendants further submitted that by virtue of clause 13, it was made clear that the defendants would get the said flat vacated by the tenant by 30th June, 2004 and in case the same was not achieved by that date, the vendee would have the option to rescind the agreement and the vendor would be liable to refund the amount of Rs.1,00,000/- alongwith interest @ 15%. Thus, according to the learned counsel for the defendants, it was agreed by and between the parties that 30.06.2004 would be the last date by which the flat would be got vacated by the defendants. If the tenant was not evicted by 30.06.2004, then the plaintiff had the option to rescind the agreement. At the same time, if the

premises had been vacated within the period stipulated, then within fifteen days, the plaintiff was to meet his commitments under the agreement, failing which the vendor was entitled to forfeit the advance of Rs.1,00,000/-. Therefore, according to the learned counsel for the defendants, the contract was clearly time-bound. It was time-bound with regard to the eviction of the tenant and it was time-bound with regard to the payment to be made by the plaintiff. In either eventuality, the affected party had the right to rescind the contract. The learned counsel for the defendant submitted that vacant possession was obtained from the tenant on 15.05.2004 and, therefore, the plaintiff did not have the option to rescind the agreement. However, the plaintiff was required to fulfill its commitments within fifteen days of the vacation of the flat or by 15.07.2004 whichever was later. Therefore, the plaintiff was required to make the payment of the balance amount of Rs.31.5 lakhs by 15.07.2004 which he failed to do and, therefore, time being of the essence of the contract, the contract became voidable at the option of the defendants in terms of Section 55 of the Indian Contract Act, 1872 and by sending the letter dated 27.07.2004 (Exhibit-P-3), the defendants exercised this option and rescinded the contract and forfeited the amount of Rs.1,00,000/-. Referring to the affidavit by way of evidence of DW-1 (representing the examination-in-chief), the learned counsel for the petitioner submitted that it has come in evidence that the

defendant No.2 had at the time of execution of the agreement to sell informed the plaintiff that she was not in a position to get the property converted from leasehold to freehold and that the plaintiff readily agreed for the same and also assured her that as soon as the tenant vacated the property, the plaintiff would make the balance payment of the sale consideration and it is only on this consideration that she entered into the agreement to sell dated 31.03.2004.

13. The learned counsel for the plaintiff submitted that the contentions of the learned counsel for the defendants that time was of the essence of the sale agreement are not correct. According to him, clause 12 ought not to be read in isolation and has to be read in conjunction with the other clauses of the agreement. The document has to be read as a whole. He further submitted that in terms of Section 92 of the Indian Evidence Act, 1872, no evidence of any oral agreement or statement would be admissible as between the parties to a contract which has been set down to writing for the purposes of contradicting, varying, adding to or subtracting from, its terms. Therefore, reference to any oral understanding or arrangement, as submitted by the learned counsel for the defendant, would be entirely inadmissible. The question of whether time was of the essence of the contract or not has to be gathered from the contract itself and upon reading the

document as a whole. He submitted that it is nowhere mentioned in the contract that time was of the essence.

14. Moreover, he submitted that clause 12 itself refers to the vendee meeting its "commitment". The vendee's (i.e., the plaintiff's) commitments under the agreement were simply these: *"that after the said flat was got vacated from the tenant and after the same was converted into freehold, the plaintiff was to be ready with the balance amount of Rs.31.5 lakhs"*. He submitted that the conversion from leasehold to freehold was to be done by the defendants. Unless this was done, the question of the plaintiff failing to meet its commitments would not arise. The plaintiff referred to the exhibited documents and in particular to Exhibits-P-4, P-5, P-6, P-7, P-8, P-9 and P-10 to indicate that all the steps with regard to conversion were to be undertaken by the defendants as the flat stood allotted to the defendant No.1 and defendant No.2 was acting as his attorney. He referred to Exhibit-P-4 which is a challan indicating deposit of the service charges of Rs.11075/-. This payment has been made to the DDA in respect of conversion of the said flat. The signature of the tenderer is that of V.L. Chandra (the defendant No.2). This challan is of 24.05.2004 though the bank stamp gives the date of 25.05.2004. Exhibit-P-5 is an acknowledgment dated 11.06.2004 issued by

the DDA in favour of the defendant No.1 acknowledging receipt of an application for execution of the Conveyance Deed, which, if completed, would signal the conversion from leasehold to freehold. The draft Conveyance Deed (Exhibit-P-6) also indicates that it has to be signed by the defendant No.1 or by the defendant No.2 on his behalf as a power of attorney holder. Exhibit-P-7 is a letter issued on 29.04.2004 by the DDA in favour of the defendant No.1 requiring him to get the Conveyance Deed papers stamped from the Office of the Collector of Stamps and thereafter to return three copies of the Conveyance Deed duly stamped to the DDA alongwith the documents specified therein, including the proof of capitalisation services / charges amounting to Rs.11075. Exhibit-P-8 is a Special Power of Attorney which has been executed by the defendant No.1 on 10.05.2004 appointing the defendant No.2 as his lawful attorney in respect of the said flat as Special Attorney to receive the Conveyance Deed from the DDA, get the papers stamped from the Office of the Collector of Stamps and pay the stamp duty, to present, execute, sign the Conveyance Deed before the concerned officer of the DDA and to sign and present the same for registration in the office of the concerned Sub-Registrar and to get the said Conveyance Deed registered. Exhibit-P-8 also gives the signatures of the attorney and the same is attested by the defendant No.1. Defendant No.2 has also signed on the said Special Power of

Attorney. Exhibit-P-9 is a challan in respect of a payment of Rs.66060/- made in the SBI in respect of the stamps for the Conveyance Deed and Exhibit-P-10 is a similar challan for a sum of Rs.20/-. These amounts paid by virtue of the aforesaid challans were admittedly paid by the plaintiff to the defendants. Exhibit-P-4 clearly indicates that the same had been tendered by the defendant No.2 as she had signed the said challan. In the wake of all these facts, the learned counsel for the plaintiff submitted that not only did the contract put the obligation on the defendants to get the said flat converted from leasehold to freehold, the defendants did, in fact, initially take steps towards conversion from leasehold to freehold, but, thereafter, for reasons best known to them, held their hands and did not go ahead with the same. As a result of which, the property was not converted to freehold. This led to the plaintiff issuing the letter dated 09.07.2004 (Exhibit-D-2), wherein the plaintiff informed the defendants that they had not filed the required documents for conversion of the said flat into freehold despite the plaintiff paying the requisite fee of Rs.41,275/- and Rs.24,765/- being the stamp duty and transfer duty respectively to fulfill his obligation as stipulated in clause 4 of the agreement. It was also noted that the plaintiff had further paid a sum of Rs.11075/- as service charges to the DDA. By the said letter dated 09.07.2004, the plaintiff requested the defendants to take necessary steps to adhere to the time stipulated in the

agreement, i.e., 15.07.2004. It was also indicated in this letter that the plaintiff was ready with the balance consideration amount which was payable to the defendants at the time of execution of the Sale Deed before the Sub-Registrar to meet the time stipulated in the agreement to sell. Thereafter, ensued the correspondence already referred to, namely, the letters dated 13.07.2004 (Exhibit-P-2), 21.07.2004 (Exhibit-D-3) and 27.07.2004 (Exhibit-P-3).

15. Accordingly, the learned counsel for the plaintiff submitted that time was of the essence of the contract only upon the defendant complying with the obligations cast upon it, namely, having the property vacated by 30.06.2004 and getting the said flat converted from leasehold to freehold. These were the conditions precedent to the plaintiff making the payment of the balance amount of Rs.31.5 lakhs. He submitted that as the defendants were obliged to get the conversion of the said flat from leasehold to freehold, delay on their part cannot be taken advantage of by them for avoiding the contract on the pretext that time was of the essence of the contract.

16. In order to appreciate the arguments advanced by the counsel for the parties, it would be necessary to refer to Section 55 of the Indian Contract Act,

1872. The same reads as under:- 96

> "55. **Effect of failure to perform at a fixed time, in contract in which time is essential**—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do such thing at or before a specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.
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> **Effect of such failure when time is not essential.**—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or bfore the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
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> **Effect of acceptance of performance at time other than agreed upon.**—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so."

17. Reading the first paragraph of Section 55, it is apparent that when a party to a contract promises to do a certain thing at or before a specified time and fails to do such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract. The

second paragraph of Section 55 provides that if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure due to do such thing at or before the specified time; but the promisee is entitled to compensation from the promissor for any loss occasioned to him by such failure. In ***Swarnam Ramachandran (SMT) v. Aravacode Chakungal Jayapalan*: 2004 (8) SCC 689**, the Supreme Court, in para 12, held that time is presumed not to be of essence of the contract relating to immovable property. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving opportunity to the other side to adduce rebuttal evidence that time was not of the essence. In the said decision, the Supreme Court, referring to a decision of the High Court of Andhra Pradesh in ***Nannapaneni Subayya Chowdary v. Garikapati Veeraya*: AIR 1957 AP 307**, observed that in a suit for specific performance all that is necessary for the purchaser to show is that he was ready and willing to fulfill the terms of the agreement; that he had not abandoned the contract; that he had kept the contract subsisting. In ***Arosan Enterprises Ltd v. Union of India & Another*: 1999 (9) SCC 449** in paragraph 27 thereof, the Supreme Court observed that mere fixation of a period of delivery or a time in regard thereto does not by itself make time as the essence of the contract. The agreement has to be considered in its entirety and

on proper appreciation of the intent and purport of the clauses incorporated therein. The statement of facts and the relevant terms of the agreement ought to be noted in their proper perspective so as to assess the intent of the parties. The Supreme Court held that the agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the case before the Supreme Court, as the port of discharge had not been been named nor the surveyor appointed—without whose certificate, the question of any payment would not arise—it was held that time was not the essence of the contract. Therefore, while considering the arguments advanced by the parties, what has to be seen is the contract itself. As rightly pointed out by the learned counsel for the plaintiff, any oral evidence in derogation of the contract would be inadmissible by virtue of Section 92 of the Evidence Act. Therefore, the question as to whether time was of the essence of the contract has to be ascertained from the terms of the contract read as a whole. As indicated by the decision of the Supreme Court, it must also be borne in mind as to what are the corresponding obligations of the parties. For instance, if it is held that there were certain obligations which were cast upon the defendants and that they did not fulfill the same, then surely those defendants would not be entitled to insist upon the completion of the contract within the stipulated time. In such a situation, unless

those obligations were fulfilled by the defendants, time could never be regarded as the essence of the contract. This is the ratio of the decision in the case of ***Arosan Enterprises Ltd*** *(supra)*. Clause 12 of the contract has already been set out hereinabove. Another important clause is clause 4 which the defendants are shying away from referring to. The same reads as under:-

> "4. That after getting the property converted into freehold the VENDOR will sign and execute proper Sale Deed in favour of the VENDEE or his nominee (s) and will get same registered with sub-registrar, New Delhi however the expenses for conversion of flat into free hold will be borne by vendee."

From a plain reading of clause 4, it is apparent that the vendor, after getting the property converted into freehold, is required to sign and execute a proper sale deed in favour of the vendee and is required to get the same registered with the Sub-Registrar, New Delhi, 'however', the expenses for conversion of the flat into freehold were to be borne by the vendee. The word 'however' is key to the understanding of the aforesaid clause. All the obligations preceding the word 'however' are cast upon the vendor and the obligation as regards expenses which follow the word 'however' are cast upon the plaintiff (vendee). Interpreting the said clause in plain English, it is apparent that the obligation of getting the property converted from leasehold to freehold was on the vendor, but the expenses for such conversion were to be borne by the vendee (plaintiff). When the plain

meaning of the clause is clear, then the assistance of extrinsic evidence cannot be availed of. That is a well-settled principle of interpretation. Therefore, this much is clear that the obligation of getting the said flat converted from leasehold to freehold was on the defendants and not on the plaintiff.

18. Insofar as the plaintiff is concerned, he was required to do three things:- a) to make the payment of the advance amount of Rs.1,00,000/- which he did; b) to make the payment for the conversion charges and fee which also he did; and c) to make the payment for the balance amount of Rs.31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the sale deed, which occasion did not arise because the defendants had not got the said flat converted from leasehold to freehold, but which the plaintiff was ready and willing to do and as it has come in evidence that he had the funds for the same. It is also to be noted that after the filing of the present suit, the fixed deposits for the balance amounts have been deposited by the plaintiff in court as indicated in the order dated 27.09.2004 itself.

19. As regards the defendants, they were required to:- a) evict the tenant from the said flat; b) to get the said flat converted from leasehold to

freehold; and c) execute the sale deed and hand over the vacant physical possession of the same to the plaintiff at the time of registration. The defendants fulfilled the obligation referred to in (a) above, but did not fulfill the obligation of having the said flat converted from leasehold to freehold. In the context of this factual background and upon a conjoint reading of clauses 4 and 12 of the said agreement, it becomes clear that the obligations cast upon the defendants were not fulfilled and, therefore, there was no failure on the part of the plaintiff to meet its commitment under this agreement. By not fulfilling their obligations, it was indeed unfair on the part of the defendants to insist upon the plaintiff to make the balance payment by 15.07.2004 on the premise that time was of the essence of the contract. Reading the contract as a whole, in view of the unfulfilled obligations of the defendants, it cannot be said that time was of the essence of the contract. As regards the question of the plaintiff having failed to perform his part of the agreement, I have already held that the plaintiff did all that it could do and was ready and willing to perform his obligation of making the balance payment of Rs.31.5 lakhs provided the flat was converted from leasehold to freehold by the defendants.

20. It was also argued by the learned counsel for the defendants that a decree of specific performance ought not to be granted where it would result in a bonanza for the plaintiff. He also referred to several decisions. In the present case, he urged that this court should take judicial notice of the rise in property prices. A consequence of which is that the plaintiff would have gained substantially if a decree were to be passed in his favour. This, to my mind, is one side of the argument. The other being - what about the defendants' being presented with a `bonanza' on the same count, if a decree is not granted? While considering these rival view points one must not lose sight of the fact that the parties had entered into a solemn agreement and chose to bind themselves to its terms. Could either party be permitted to resile from its commitment simply because it would now get a better deal elsewhere or simply because, *ex post facto*, the other party stands to gain from the transaction? Certainly not. If such a course were to be permitted then the sanctity of a binding contract would be thrown out of the window.

21. Therefore, this issue is also decided in favour of the plaintiff and against the defendants.

22. **Issue No.3.**

Although while framing this issue, the onus has been put on the defendants, it appears to be a typographical mistake and the onus of proving this issue is actually on the plaintiff. In ***Manjunath Anandappa Urf Shivappa Hanasi v. Tammanasa and Others*: 2003 (10) SCC 390**, the Supreme Court, after referring to a number of its earlier decisions, concluded that a plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of the suit was ready and willing to perform his part of the contract, but must also prove the same. In the present case, the plaintiff has specifically averred in the plaint that it was ready and willing to perform his part of the contract. He has been able to demonstrate that he was ready with the balance amount of Rs.31.5 lakhs as indicated in the discussion under Issue No.2. This fact is further demonstrated by his depositing the fixed deposits with the Registrar of this court which clearly indicate that not only was he ready and willing on the due date of performance, but his readiness and willingness continued at the time of institution of the suit. It must also be noted that the suit was filed on 10.08.2004 which is immediately after the plaintiff received the notice dated 27.07.2004 (Exhibit-P-3) whereby the defendants purported to rescind the agreement to sell dated 31.03.2004. It is not as if the plaintiff had slept over his rights and only as an afterthought had come to court seeking specific

performance of the agreement to sell. From the facts and circumstances discussed in detail under Issue No.2, it is apparent that the plaintiff has demonstrated that it has complied with the statutory requirements under Section 16 (c) of The Specific Relief Act, 1963 and has, therefore, made himself entitled to a decree for specific performance. The plaintiff has been able to prove the existence of the agreement. He has proved that the payments with regard to fees and charges for conversion of the property, an obligation cast upon him, were paid by him. The advance amount of Rs.1,00,000/- was paid and the only thing remaining to be done was to pay the balance amount of Rs.31.5 lakhs on the defendants fulfilling their obligations of evicting the tenant from the said flat and getting the same converted from leasehold to freehold. The plaintiff has also demonstrated that he had the funds available and was ready and willing to go through with the contract at all relevant times. In this view of the matter, this issue is decided in favour of the plaintiff inasmuch as he is entitled to a decree for specific performance on the grounds pleaded in the plaint.

23. **Issue No.4.**

In view of the decision in favour of the plaintiff under Issue Nos.2 & 3, this issue does not fall for consideration.

24. **Issue No.5.**

Accordingly, the suit for specific performance of the agreement to sell dated 31.03.2004 in respect of the flat bearing No.C-9/9551, Vasant Kunj, New Delhi is decreed in favour of the plaintiff and against the defendants. The defendants shall carry out the conversion of the said flat from leasehold to freehold and thereafter execute the sale deed and hand over the vacant physical possession to the plaintiff in terms of the said agreement. The defendants shall complete the conversion of the said flat from leasehold to freehold within a period of two months and the sale deed shall be executed and registered within ten days thereafter. Possession shall be handed over simultaneously alongwith execution and payment of the balance amount by the plaintiff. The plaintiff is permitted to utilize the fixed deposit receipts deposited with the court for the purposes of making the payment of the balance consideration amount.

The suit is accordingly decreed with costs.

BADAR DURREZ AHMED
(JUDGE)

July 04, 2006
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 901/2004

KULDIP GANDOTRA

..... Plaintiff

Through: Ms. Shraddha Bhargava, Adv.

versus

SHAILENDRA NATH

..... Defendant

Through: None.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% 27.02.2015

I.A. 3131/2015 in CS(OS) 901/2004

The suit was decreed with costs on 04.07.2006. The learned counsel for the applicant/plaintiff submits that although a copy of the said decree was applied for many times, but was delivered to the plaintiff only after a period of 9 years on 30.01.2015. It was then discovered that erroneously in the decree the onus of costs has been imposed upon the plaintiff instead of the defendant, as held in the judgment. This evidently is an error which should be rectified. Let the decree be rectified to the extent that the costs shall be payable by the defendant. The application is allowed in the above terms.

NAJMI WAZIRI, J

FEBRUARY 27, 2015/acm